CASE LAW UPDATE

Presented by Michael A. Dribin, Esq.

Harper Meyer Perez Hagen O'Connor Albert & Dribin, LLP

Estate Planning Council of Miami

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Probate Administration/Creditor Claims

***Jones v. Golden*, — So.3d —-, 2015 WL 5727788 (Fla. Oct. 1, 2015)**

Holding: In resolving split between 4th DCA on one hand, and 1st and 2nd DCA on the other, the Florida Supreme Court approved the decision of 4th DCA and held that the three-month limitations period in § 733.702(1) is not applicable to "known or reasonably ascertainable creditors" who are never served with a copy of the notice to creditors.

Section 733.702(1) has two limitations periods: (1) unknown creditors must file within 3 months of date of first publication; (2) as to reasonably ascertainable creditors, the claim must be filed within the later of 3 months after first publication or 30 days after service of the notice. In the Morgenthau decision (26 So. 3d 628) the First DCA and in the Lubee decision (77 So. 3d 882) the Second DCA both held that a creditor, even an ascertainable creditor who did not receive actual notice of the notice to creditors, must file their claim within the three-month period for non-ascertainable creditors to file claims. In the Golden case, the 4th DCA held that the statute of limitations for an ascertainable creditor to file its claim does not begin to run until such a creditor is served with the Notice to Creditors. The Supreme Court of Florida, agreed with the Fourth DCA in holding that, when the required notice was never served to an ascertainable creditor, the limitations period never begins to run and cannot bar the claim. The creditor is then "absolved from the limitations of § 733.702(1)" and the claim is timely if filed within two years of the decedent's death under § 733.710. This holding was compelled not just because of language of the statute, but also due process considerations, as expressed by the United States Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988).

Probate Administration/Creditor Claims

***Soriano v. Estate of Luis F. Manes*, ___ So. 3d ___, (3d DCA Oct. 14, 2015) - 40 Fla. L. Weekly D2350b**

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

Holding: Alleged victim of battery who notified the Decedent's criminal attorney before his death that she was represented by private counsel, was not a "reasonably ascertainable" creditor of the decedent entitled to personal service of the notice to creditors, and her statement of claim filed four months after first publication was untimely.

Decedent retained a criminal defense attorney to represent him and the PR (his wife) "may" have paid a retainer fee to the criminal attorney. When the criminal attorney attempted to schedule a deposition with Petitioner without a court order, the Prosecutor called Decedent's criminal attorney and advised her that Petitioner had a private attorney. Petitioner's attorney spoke to Decedent's criminal attorney and advised her that he was representing Petitioner.

There was no evidence that Petitioner or her attorney advised the Decedent, or his attorney, or the PR that there was an actual or potential civil claim. The fact that PR paid the criminal attorney's retainer is of no moment, since there was no evidence the attorney was ever made aware of any actual or potential civil claim. Further, PR need only make "reasonably diligent efforts to uncover identities of creditor," and not "everyone who may conceivably have a claim is properly considered a creditor entitled to actual notice." There was no evidence a more diligent search would have revealed Petitioner's claim. And, most importantly, there no evidence that Petitioner put *anyone* on notice that she was pursuing, or intended to pursue, a civil claim. As a "conjectural creditor" she was not entitled to service.

Probate Administration/Creditor Claims

***Oreal v. Steven Kwartion, P.A.*, ___ So. 3d ___, (4th DCA, March 30, 2016)**

Holding: A probate court cannot impose an "equitable setoff" on interest owed to a creditor on a valid claim against the estate where F.S. § 733.705(9) provides that "[i]interest shall be paid by the personal representative on written obligations of the decedent providing for the payment of interest."

In ruling on the personal representative's untimely objection to the creditor's claim, the probate court granted the creditor's motion to compel payment but reserved the right to determine whether a set-off against the claim's interest was appropriate due to any unexcused and excessive delay by the creditor in attempting to perfect and collect on the claim. The personal representative then filed a motion for equitable set-off which the court granted, finding that the creditor had an equitable duty to prevent the accumulation of interest. On appeal, the 4th DCA reversed, holding that just as a court cannot rewrite a contract to relieve a party from an apparent hardship of an improvident bargain, a court cannot use equity to remedy all situations the court perceives to be unfair. "Where the legislature has provided" "a plain and unambiguous statutory procedure … courts are not free to deviate from that process absent express authority."

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

Probate Administration/PR Entitlement to Possession of Assets

***Delbrouck v. Eberling*, ___ So. 3d ___, (4th DCA Oct. 14, 2015) - 40 Fla. L. Weekly D2326a**

Holding: When property is titled in a decedent, but another claims a colorable right to possess the same property, the question of who should possess the property, pending final resolution of the claim of entitlement, is a factual question that should be resolved by a preliminary evidentiary hearing.

Delbrouck alleged he and decedent were operating a business on real property owned by decedent. PR moved to compel Delbrouk to surrender real property to her. Delbrouck filed constructive trust action as to property. Trial court granted in part PR motion to surrender property. 4th DCA reversed. Section 733.607(1) states that any property may be left with "the person presumptively entitled to it" unless possession of the property by the PR will be "necessary" for purposes of administration. The PR's request for delivery of the property is conclusive evidence that the possession of the property by the PR is "necessary." F.S. 733.607(1). The 4th DCA reasoned that while a PR's *need* for possession may not be contested, this does not mean that the PR's *right* to possession or ownership after the Decedent's death cannot be contested in a probate proceeding. And the very fact the statute says "conclusive evidence" implies than an evidentiary hearing may be required.

Probate Administration/Elective Share

***Blackburn v. Boulis*, ___ So. 3d ___, (4th DCA Jan. 20, 2016) - 41 FL. L. Weekly D203a**

Holding: Where the personal representative did not distribute to spouse the minimum value of elective share awarded by court order until several years after the order was rendered, the spouse was entitled to receive interest on the withheld minimum elective share dating back to the date of valuation order. However, while it was inequitable for spouse to have been denied the opportunity for a reasonable return on her court-determined minimum elective share (for 4 years in that case), it would likewise be inequitable for spouse to enjoy a windfall of interest on a portion of her minimum elective share which, due to taxes, she would not be entitled to retain. Therefore, probate court did not abuse its discretion by exempting from the interest-assessment 60% of the minimum elective share.

Moreover, the elective share statute, § 732.207, provides for calculation of the elective share based on the fair market value of the estate on the date of death, computed after deducting four types of expenses. Attorney's fees are not one of those four. Therefore, probate court erred

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

in deducting from minimum elective share the attorneys' fees paid by the personal representative in litigating claims from the surviving spouse's elective share.

Probate Litigation/Will Execution

***Malleiro v. Mori*, ___ So. 3d ___, (3d DCA Sept. 30, 2015) - 40 Fla. L. Weekly D2226c**

Holding: An Argentinian "notarial will" that was not signed by the testator or the witnesses was an invalid nuncupative will under Florida law.

The will was created in Argentina by the testator orally pronouncing her testamentary wishes to a notary who transcribed them. The notary read the transcribed wishes back to the testator, and the testator orally approved it in the presence of witnesses. The will was then executed by the notary, but not signed by the testator or witnesses.

Florida law recognizes a valid foreign will that does not comply with all of Florida formalities, if the nonresident's will is valid under the law of the state or country where executed. F.S. § 732.502(2). However, there are two kinds of wills that are never valid in Florida: holographic and nuncupative wills. A nuncupative will is a will made by the verbal declaration of the testator. A notarial will is a "nuncupative will" because, as noted in a treatise surveying the practices of difference countries, notarial wills commonly consist of (1) an oral declaration to a notary, (2) reduction of oral wishes to writing by the notary, (3) after being read aloud, the will is signed by the testator, notary and witnesses, and (4) the will is retained by the notary and in some countries, registered in a central registry. However, while every notarial will is in nuncupative in the sense that it is "orally pronounced," to declare all notary wills nuncupative would create a broad prohibition of foreign notarial wills, which would run contrary to policy in § 733.205. Therefore, the Court declared that § 732.502(2)'s prohibition of nuncupative wills does not bar all notarial wills, but does bar notarial wills that are unsigned by the testator. This honors the policy of comity reflected in § 733.205 by recognizing the validity of most foreign notarial wills.

Probate Litigation/Will Contest/Undue Influence/Dependent Relative Revocation

***In re Estate of Virginia E. Murphy*, ___ So. 3d ___, (2d DCA Nov. 6, 2015) - 40 Fla. L. Weekly D2507a**

Holding: When a will is invalidated based on undue influence, a court's consideration of the doctrine of dependent relative revocation requires a broad construction of "similarity" between the invalid will and a prior revoked will, and the court's analysis must consider not just the testamentary instruments, but also extrinsic evidence. Also, when applied in the case of undue influence, the burden of proof shifts to the party opposing its application. Therefore, any party

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

opposing the presumption of dependent relative revocation must prove that the last will's revocation clause was somehow untainted by the same undue influence that affected the rest of that will and that the testator held an independent, untainted intention to revoke all of her prior wills at the time she executed the latest will.

The proper analysis in this case was: (i) did the decedent's second cousin (who claimed undue influence by decedent's attorney and his assistant) establish sufficient similarity between decedent's wills that would have given rise to the doctrine of dependent relative revocation; (ii) if so, were there sufficient record facts to overcome that presumption so that the challenged will's revocation clause could withstand; and (iii) if not, and the presumption remained intact, which, if any, will or residuary devise in decedent's prior wills reflected her true testamentary intention? As to the "similarity" requirement, the Court found that, in case of undue influence, any construction of similarity must necessarily account for the intrusion of another's intentions. In such circumstances the similarity requirement should be viewed with a very broad interpretation and consideration of extrinsic evidence is appropriate in order to determine the testator's true intent. Looking at such extrinsic evidence, the 2nd DCA noted that none of the 48 intestate heirs who would take if the residue were to be distributed by intestacy (instead of by provisions in an earlier will) were mentioned within any of the decedent's six wills. In contrast to the close relationship she had with her second cousin, it appears the decedent never knew her intestate heirs, and they never knew her. It was appropriate to utilize the doctrine of dependent relative revocation in this instance.

Probate Litigation/Payable on Death Accounts/Undue Influence

***Keul v. Hodges Blvd. Presbyterian Church*, ___ So. 3d ___, (1st DCA Nov. 24, 2015) - 40 Fla. L. Weekly D2619c**

Holding: A POD account, although not in the strictest sense a testamentary device and not subject to the formalities required of wills, functions as a will substitute and partakes of the same equitable considerations that apply to testamentary transfers. Thus, the POD designation was subject to challenge on grounds of undue influence.

The probate court did not err in ordering that Personal Representative (who was found liable for undue influence) return the POD funds to the Estate, rather than entering a money judgment against the PR. The probate court has discretion to enter a money judgment or provide other remedies. Further, the order was not improper even though it could subject the PR to incarceration for contempt of court. The law of civil contempt protects the PR from being indefinitely incarcerated without an evidence-based finding that she has the present ability to pay

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

the purge amount. The record did not show that the probate court ordered incarceration under either civil contempt or indirect criminal contempt, and therefore argument was premature.

Probate Litigation/Will Contest/Undue Influence

***Luciani v. Nealon*, ___ So. 3d ___, (5th DCA Dec. 4, 2015) - 40 Fla L. Weekly D2697b**

Holding: In this will contest, the issue was whether the trial court erred in granting a motion for involuntary dismissal at the close of appellant's case. The 5th DCA held that it was error for the trial court to *weigh* the plaintiff's evidence to determine whether the plaintiff met his evidentiary burden of proof on any of the causes of action in granting the judgment of involuntary dismissal. On a motion for involuntary dismissal made after the close of the plaintiff's case, the trial court was tasked with determining whether the plaintiff's evidence, when considered in the light most favorable to the plaintiff, fails to establish a *prima facie* case on the plaintiff's claims.

Notwithstanding the trial court's error, the 5th DCA affirmed the judgment of involuntary dismissal under the "tipsy coachmen" doctrine, which allows an appellate court to affirm a trial court that reached the right result, but for the wrong reasons. The 5th DCA determined that after review of the entire record and having considered the evidence presented in the light most favorable to the plaintiff, the plaintiff failed to establish a *prima facie* case as to his causes of action for fraud, undue influence and lack of testamentary capacity.

Probate Litigation/Will Contest/Procedure

***Parker v. Parker*, ___ So. 3d ___, (4th DCA Feb. 3, 2016)**

Holding: Decedent's children (and other family members) are permitted to pursue claims to set aside *inter vivos* conveyances based upon allegations of undue influence, without requiring that the decedent's estate be joined as a party to the lawsuit. The estate is not an indispensable party to such an action. While a personal representative has rights to property that remains in the decedent's possession at death, here the subject properties were not part of the decedent's estate at the time he died because they had already been conveyed *inter vivos*. There is nothing in F.S. § 733.607 that makes the estate an indispensable party.

Probate Litigation/Creditor's Claims/Relation Back Doctrine

***Richard v. Richard*, ___ So. 3d ___, (3d DCA, May 4, 2016)**

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

Holding: The relation back doctrine set forth in F.S. § 733.601 applies to "acts" taken by a personal representative prior to his or her appointment and is not limited to those acts which can be characterized as "powers," to the exclusion of those acts which can be characterized as "duties."

On June 14, 2012, the probate court entered an order appointing the decedent's surviving spouse (Karen) and his son (Joel) as co-personal representatives and the letters of administration were signed. However, on June 13, 2012, one day prior to the court's order appointing them as co-personal representatives, Karen and Joel signed and published the first notice to creditors. Both signed the notice as "personal representative." On September 21, 2012 (more than three months after the first notice to creditors was published), Karen filed a statement of claim, asserting that pursuant to a prenuptial agreement, she was entitled to nearly $4 million in retirement benefits from the estate. Karen claimed that the estate became aware that she may have a potential claim against the estate, and therefore, became obligated to serve her with notice, but failed to do so and therefore her claim was timely. In the alternative, she argued that the Notice to Creditors was null and void because it was not published by a duly-appointed personal representative. The issue on appeal turned on whether the act of publishing the Notice to Creditors was included in the relation back doctrine's application.

Contrary to Karen's position, the 3rd DCA held that the statute does not distinguish between actions taken pursuant to a "duty" versus a "power" of a personal representative. Instead, the relation back doctrine applied to the personal representative's "act" of publishing the Notice to Creditors, and the order appointing the personal representatives related back and validated the pre-appointment act of publication of the notice to creditors.

Trust Administration/Trustee Fees

***Robert Rauschenberg Foundation v. Grutman*, ___ So. 3d ___, (2d DCA Jan 6, 2016) - 41 Fla. L. Weekly D87b**

Holding: The language in F.S. § 736.0708(1), which provides for an award of trustee's fees that is "reasonable" under the circumstances when the trust does not specify a compensation method, refers to the factors-based reasonableness method set forth in *West Coast Hospital Ass'n v. Florida National Bank of Jacksonville*, 1000 So. 2d 807 (Fla. 1958), not the lodestar reasonableness method used for attorneys' fees set forth in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). The *West Coast* factors are:

> The amount of capital and income received and disbursed by the trustee; the wages or salary customarily granted to agents or servants for performing like work in the community; the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

> fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services; payments made by the *cestuis* to the trustee and intended to be applied toward his compensation.

The 2nd DCA upheld the order awarding $24,600,000 in trustee's fees (the Foundation argued the trustees were only entitled to $375,000 in fees under lodestar method).

<u>Trust Litigation/Trust Contest/Qualified Renunciation</u>

***Gossett v. Gossett*, ___ So. 3d ___, (4th DCA Dec. 16, 2015)**

<u>Holding</u>: In this case, a beneficiary under a trust accepted partial distributions from the trust but then submitted a qualified renunciation of his right to received trust benefits if he was successful in a trust contest. While the equitable doctrine of "renunciation" does generally require that a person challenging a trust instrument first renounce his interest in the trust by some means sufficient in law to operate as a divesture, the rule does not apply when the challenger has accepted an interest that he or she is legally entitled to receive regardless of whether the instrument is sustained or overthrown.

There are three rationales underlying the rule of renunciation: (1) protects the trustee if the trust is invalidated, (2) show that the suit is sincere and not vexatious, and (3) ensures the property is available for disposition and free from third-party claims. In this case, beneficiary (settlor's son) was not estopped from challenging amendments four and five to the Trust by accepting prior distributions because all three rationales were satisfied: the trustee was protected because the son was entitled to *more* than the already paid distributions under any of the amended trusts; the risk of vexatious and insincere claims is present in any case, but no more so here; and the distributions to the soon were free from third-party claims as the son was entitled to more than the already distributed amount.

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

Trust Litigation/Procedure

***Genauer v. Downey & Downey, P.A.*, ___ So. 3d ___, (4th DCA Jan 6, 2016) - 41 Fla L Weekly D136a**

Holding: While a trial court has the discretion to limit the extent to which interveners may participate in proceedings, the limitations cannot go so far as to completely bar the interveners from addressing their concerns in the litigation.

In this case, the trial court granted the trust beneficiaries' motion to intervene in a case brought against the Trustee for unpaid attorneys' fees. However, while permitting the trust beneficiaries to intervene, the trial court also prohibited the beneficiaries from filing "*any* motion, answer, counterclaims, or engage in any discovery." The 4th DCA held that the limitations exceeded the trial court's discretion because they were so severe as to effectively result in a denial of intervention.

Trust Litigation/Statute of Limitations

***Woodward v. Woodward,* ___ So. 3d ___, (4th DCA May 4, 2016)**

Holding: When adequate disclosure is not given to a beneficiary, the statute of limitations does not begin to run, unless a final trust accounting is given and a notice is given of the availability of the trust records for examination, or disclosure is later made.

In this case, a beneficiary of a trust did not have knowledge of the termination of that trust in 2002 or of being excluded from the new trusts until nine years later, in 2011. Since the final trust accounting procedure was not followed, the statute did not start to run until October 2011 when the accountings for the old trust and the two new trusts were given. Because the beneficiary first obtained knowledge via an accounting with a limitations notice, the six month statute of limitations applied and not the usual four year statute of limitations from the October 2011 date. The beneficiary filed suit within those six months, and his claim was deemed timely. Florida Statutes section 736.1008 codifies the rules in this area.

Trust Litigation/Construction of Trust

***Dowdy v. Dowdy,* ___ So. 3d ___, (2d DCA Jan. 6, 2016) - 41 Fla. L. Weekly D85b**

Holding: This case involved construction of a trust as to who the successor trustee was to be and some less than artful drafting that made the answer to that question not clear.

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

The dispositive language "*death of each* of the Initial Trustees" in a revocable trust created by a husband and wife wherein husband and wife were named as the Initial Trustees, and children as successor trustees, had to be construed in light of similar phraseology elsewhere in the trust instrument. When the trust instrument was read as a whole the language "death of each" must mean the death of *both*, in which case the succession of the Initial Trustees occurred only upon the death of *both* Initial Trustees. Therefore, upon the death of the husband, the wife became the only trustee (to the exclusion of stepson who claimed he had become a co-trustee), and, pursuant to broad authority in the trust instrument, the wife was authorized to sell the trust property and to invade all the income and principal for her own benefit, support and maintenance.

Trust Litigation/Construction of Trust

***Vigliani v. Bank of America*, ___ So. 3d ___, (2d DCA March 9, 2016) - 41 Fla. L. Weekly D632a**

Holding: Issue: did a revocable trust which was executed in 2009 direct that the Family Trust be funded with an exemption equivalent of $3.5 million (amount of exemption in 2009) or the exemption equivalent of $5.0 million, the amount of the exemption in the year of death (2010)? There was extensive language in the trust on the issue of the uncertainty in the amount of the exemption equivalent or whether there might not be any estate tax in the year of death. The trial court, relying on one section of the trust suggesting that the date of execution was the relevant date, ruled that the Family Trust should be funded with $3.5 million. The 2nd DCA, however, in reviewing the trust more as a whole found that the trial court erred in isolating select provisions of articles in the Restatement and not interpreting the language in those provisions in the context of the remaining provisions, and particularly the settlor's "Statement of Intentions." While the appellate court declined to state that the $5 million exemption amount was the correct amount, it remanded the case but that it was clear that the $3.5 amount was not correct. When interpreting the provisions of a trust instrument, the court should not resort to isolated words and phrases; the court should construe the instrument as a whole taking into account the general dispositional scheme and the settlor's "Statement of Intentions" set forth in the trust.

Guardianship Litigation/Removal of Guardian

***Hawley v. Batterson*, ___ So. 3d ___, (2d DCA Jan. 6, 2016) - 41 Fla Weekly D88a**

Holding: A trial court may enter an order removing a Guardian of the person when it finds that such action is necessary to protect the physical or mental health or property of the ward. However, upon entering said order, the trial court must comply with §744.1075(4)(a), which provides:

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

> If the court finds probable cause, the court shall issue an order to show cause directed to the guardian or other respondent stating the essential facts constituting the conduct charged and requiring the respondent to appear before the court to show cause why the court should not take further action. The order shall specify the time and place of the hearing with a reasonable time to allow for the preparation of a defense after service of the order.

The order to show cause must specify the time and place of the hearing with a reasonable time to allow for the preparation of a defense after service of the order.

Guardianship Litigation/Voluntary Dismissal of Petition to Determine Incapacity

***Gort v. Gort,* __ So. 3d ___, (4th DCA Feb. 3, 2016) - 41 Fla. Weekly D318a**

Holding: It was not improper for parties to a contested guardianship proceeding to enter into a settlement agreement after the petition to determine incapacity had been filed but before an adjudicatory hearing was held, even where the three examining committee reports declared that the alleged incapacitated person lacked capacity. There is no statutory requirement for an adjudicatory hearing on a petition to determine incapacity.

The guardianship law is silent on whether a court is required to hold an adjudicatory hearing, and it the generally understood that the plaintiff's right to voluntarily dismiss its own lawsuit is absolute, with exceptions for fraud on the court and child custody. The court distinguished its holding in *Jasser v Saadeth,* 97 So. 3d 241 (Fla. 4th DCA 2010) (revoking trust that was created as a form of settlement after the court had appointed an Emergency Temporary Guardian at a hearing, because the ward lacked capacity to enter into trust after the appointment of the ETG and the transfer of his legal rights to her), on the grounds that this case concerned a mental health disorder, controllable by proper medication, as opposed to a diagnosis of Alzheimer's like in *Jaaser*, and because there no adjudicatory hearing in this case. Lastly, defense of duress was unsubstantiated were there was no evidence the petitioner exerted any improper or coercive conduct. In the absence of a termination date in the settlement agreement, the court determined the agreement was enforceable until the date of death.

Guardianship Litigation/Access to Trust Assets

***In re Guardianship of Mount*, ___ So. 3d ___, (2d DCA, February 26, 2016)**

Holding: In the absence of an action properly commenced by the Guardian of a ward against the co-trustees of a trust in which the ward has a beneficial interest, the ward's beneficial interest in the trust alone does not afford the guardianship court the authority to override the decisions of the

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

co-trustees in the management of the trust. In this regard, the 2nd DCA cited *Cohen v. Friedland*, 450 So. 2d 905, 906 (3d DCA 1984) ("In the absence of proof that the trustee has failed to perform, or has performed arbitrarily, a court is without authority to remove trust assets from control of the trustee to be administered by the court or other guardian"), and reversed the court's order compelling the co-trustees to return trust funds held in a law firm's escrow account to the trust's primary bank account at Wells Fargo Bank, N.A.

Guardianship Litigation/Marriage of Ward

***Smith v. Smith*, ___ So. 3d ___, (4th DCA March 2, 2016) - 41 Fla. L. Weekly D542b**

Holding: In order to enter into a valid marriage, an incapacitated person who has had his or her right to contract removed must first ask the court to approve his or her right to marry.

The Ward was judicially declared incompetent, and the order appointing plenary guardian provided that his right to marry was "subject to approval." Notwithstanding the restriction, the Ward married without court approval and his independent counsel then instituted a proceeding to annul the marriage. Section 744.3215 outlines the rights which a person determined incapacitated retains and those which may be removed. With respect to marriage, the statute states: "If the right to enter into a contract has been removed, the right to marry is subject to court approval." Because the Ward had his right to contract removed, he had no right to marry unless the court gave its approval. Therefore, trial court correctly determined that the marriage was void.

Homestead/Proceeds from Voluntary Sale

***Lane v. Cunniffe*, ___ So. 3d ___, (4th DCA March 9, 2016) - 41 Fla. L. Weekly D598a**

Holding: Proceeds from the voluntary sale of homestead property are exempt from creditors only if the seller shows, by a preponderance of the evidence, an abiding good faith intention *prior to and at the time of the sale of the homestead* to reinvest the proceeds in another homestead within a reasonable time. Only so much of the proceeds that are intended to be reinvested may be exempt.

In a garnishment proceeding, seller testified that he had always intended to buy another home with the proceeds from the sale of his homestead and he was considering a specific property when he first listed his homestead but that property was no longer available. At the time of the hearing on seller's motion to dissolve the writ of garnishment, seller was considering a different property listed at $54,000. Based on this testimony, the trial court limited the exemption to $54,000. The 4th DCA reversed, and held that the trial court committed error by improperly relying on seller's testimony regarding his intent *at the time of the hearing*. On remand, the trial court was instructed to determine how much of the sale proceeds seller intended, at the time of the sale, to

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

reinvest in another homestead within a reasonable time and how much of the proceeds he has kept separate for that purpose.

Homestead/Specific Performance

***Mirzataheri v. FM East Developers, LLC*, ___ So. 3d ___, (3d DCA March 16, 2016) - 41 Fla. Weekly D683a**

Holding: In this case, homeowners contracted for the sale of their home but refused to close. Buyer sued for specific performance. Homeowners successfully moved for summary judgment on grounds that Florida's Constitution prohibits the forced sale of homestead. However, 3d DCA held that specific performance was not precluded by Florida's Constitution as a remedy to enforce a contract for sale of homestead property when the contract was signed by both spouses. The prohibition against "forced sale" of a homestead in Article X, Section 4 of the Constitution does not apply in the case of the voluntary execution of a contract for sale by both spouses – in that instance, the court is enforcing an agreed upon sale under consent.

Dissolution of Marriage/Planning

***Gromet v. Jensen*, ___ So. 3d ___, (3d DCA Oct. 14, 2015) - 40 Fla. L. Weekly D2347a**

Holding: In a marital dissolution case, wife did not meet her burden to prove that husband co-mingled marital assets with non-marital assets, or that non-marital assets enhanced in value as a result of husband's marital efforts, thereby prohibiting equitable distribution of the husband's three brokerage accounts that were funded by his $400,000 inheritance.

Wife failed to present competent evidence that $1,100 of marital funds were actually deposited into one of husband's non-marital brokerage accounts. And, even if she could prove which account it was deposited into, it would only convert that one of the account into a marital asset not all accounts. Second, although F.S. § 61.075(6)(a)1.b. provides that marital assets include enhancement in value of non-marital assets resulting from efforts of either party during the marriage, the wife has the burden of proof to establish that (1) husband actively managed accounts during marriage, (2) as a result, account value was enhanced, and (3) the amount of the enhancement. Record reflected that while husband did actively manage the accounts during the marriage, the accounts *decreased* in value by the time the petition for dissolution was filed. Because wife failed to prove that accounts *enhanced* in value, it was error for trial court to find that accounts were transformed into marital assets.

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921

Dissolution of Marriage/Planning

***Felice v. Felice*, ___ So. 3d ___, (2d DCA Dec. 30, 2015) - 41 Fla. L. Weekly D21e**

Holding: In dissolution case, broad language in prenuptial agreement that former husband "shall . . . be entitled to any and all equity and rights of ownership in his [premarital home]" and that former wife "shall . . . not be entitled to any interest in the premarital home" was sufficient to waive the wife's claim to any enhanced value of the home resulting from the contribution of marital funds or labor.

Relying on the Fla. Supreme Court's holding in *Hahamovitch v. Hahamvotch*. 174 So.3d 983 (Fla. 2015), the 2nd DCA concluded that even though the agreement does not specifically refer to any right to the appreciation or enhancement of the former husband's premarital home, the broad language of the agreement expressly waived the former wife's claim in the property and is considered to include appreciated or enhanced value of the property.

Dissolution of Marriage/Planning

***Schlesinger v. Schlesinger*, ___ So. 3d ___, (3d DCA March 2, 2016) - 41 Fla. L. Weekly D552f**

Holding: In an action by a surviving wife against her deceased husband's estate concerning allegations that the decedent violated their post-nuptial agreement by making gifts to his former wife, the surviving wife was not entitled to disclosure of the former wife's confidential financial information before the ultimate issue of her rights was determined.

The disclosure of personal financial information via discovery may cause "irreparable harm" to a person forced to disclose it, in a case in which the information is not relevant. Accordingly, the former wife's motion for protective order should have been granted because, at that point, no determination had been made that the surviving wife was entitled to an accounting from the estate or that she may recover from the former wife payments made by the decedent to her.

HARPER MEYER PEREZ HAGEN O'CONNOR ALBERT & DRIBIN LLP
Suite 800 • 201 S. Biscayne Blvd • Miami, Florida 33131
Telephone: 305-577-3443 • Facsimile: 305-577-9921